

**ARIZONA DEPARTMENT OF HEALTH SERVICES
DIVISION OF PUBLIC HEALTH SERVICES
SMOKE-FREE ARIZONA PROGRAM**

SUBSTANTIVE POLICY STATEMENT

#SP-087-PHS-EDC

(Revision of substantive policy statement #SP-086-PHS-EDC)

Bars and Restaurants Are Not Retail Tobacco Stores Under Smoke-Free Arizona

This substantive policy is advisory only. A substantive policy statement does not include internal procedural documents that only affect the internal procedures of the agency and does not impose additional requirements or penalties on regulated parties or include confidential information or rules made in accordance with the Arizona Administrative Procedures Act. If you believe that this substantive policy does impose additional requirements or penalties on regulated parties, you may petition the agency under the Arizona Revised Statutes Section 41-1033 for a review of the statement.

The purpose of this substantive policy statement is to notify the public of: the Department's interpretation of the term "retail store" used in A.R.S. § 36-601.01(9), the Department's interpretation of the term "retail tobacco store" defined in A.R.S. § 36-601.01(10), and the Department's determination that a "bar" or a "restaurant" as listed in A.R.S. § 36-601.01(9) cannot be either a "retail store" or a "retail tobacco store" under the Smoke-Free Arizona Act.

Under the Smoke-Free Arizona Act ("the Act"), smoking is prohibited in public places, such as: airports, banks, bars, common areas of apartment buildings, condominiums or other multifamily housing facilities, . . . , restaurants, retail stores, shopping malls, sports facilities, theaters, and waiting rooms. *See generally* A.R.S. § 36-601.01(A)(9). Under the Act, a "retail tobacco store" is defined as a "retail store." A.R.S. § 36-601.01(A)(10). A "retail store," like a "bar" and a "restaurant," is listed under the Act as a type of "public place" where smoking is prohibited. A.R.S. § 36-601.01(A)(9). Although a "retail store" is a type of "public place," under the Act, a "retail tobacco store" is exempt from the smoking prohibition. A.R.S. §§ 36-601.01(A)(9) and 36-601.01(B)(3).

Only a "retail store" that derives the majority of its sales from tobacco products and accessories is exempt from the Act's smoking prohibition. *See generally* A.R.S. §§ 36-601.01(A)(10) and 36-601.01(B)(3). Under the Act, the Department interprets a "retail store" to be a type of "public place" established with the appropriate permits and licenses from the appropriate jurisdictions to do business selling products and merchandise to the public. Under the Act, the Department interprets a "bar" to be a type of "public place" that is licensed under A.R.S. §§ 4-209(B)(6), (7), (11), (12), or (14), to do business selling and serving alcoholic beverages for consumption on the premises. Under the Act, the Department interprets a "restaurant" to be a type of "public place" possessing a food establishment license to do business selling and serving food for consumption both on and off the premises.

The "plain meaning" of the Act clearly defines a "retail tobacco store" to be a type of "retail store." A.R.S. § 36-601.01(A)(10). If a "retail tobacco store" was intended to be another type of

“public place” under the Act, such as a “bar” or “restaurant,” A.R.S. § 36-601.01(A)(10) would have stated such. The Department interprets this omission to mean that only a “retail store,” which derives the majority of its sales from tobacco products and accessories, is capable of being a “retail tobacco store” under the Act. In addition, the Department interprets “retail stores,” “bars,” and “restaurants” to be distinct types of “public places” under the Act. A.R.S. § 36-601.01(A)(9). Accordingly, since only a “retail store” is capable of being a “retail tobacco store” and since neither a “bar” nor a “restaurant” is a “retail store” under the Act, neither a “bar” nor a “restaurant” is capable of being a “retail tobacco store” under the Act.

This holds true, regardless of whether a “bar” or “restaurant” alters its operations to include retail sales of tobacco products and accessories or allows smoking during hours in which alcohol or food is not served. Since a “bar” or “restaurant” is not a “retail store” under the Act, neither a “bar” nor a “restaurant” is capable of transforming itself into “retail tobacco store.”

Only “retail stores” are capable of utilizing the exception to the Act’s smoking prohibition. A.R.S. §§ 36-601.01(A)(10) and 36-601.01(B)(3). “Bars” and “restaurants” that wish to permit patrons to smoke may utilize the outdoor patio exception found in A.R.S. § 36-601.01(B)(6).

Similarly, an establishment that uses the “retail tobacco store” exception of the Act to permit indoor smoking cannot also be a “bar” or a “restaurant” under the Act. For example, a “retail tobacco store” that permitted indoor smoking and that served food for consumption on or off the premises under a food establishment license or sold alcoholic beverages for consumption on the premises under a license issued under A.R.S. §§ 4-209(B)(6), (7), (11), (12), or (14) before the effective date of the Act will no longer be permitted to do so. Neither may a “retail tobacco store” that permits indoor smoking add food or alcohol service after the effective date of the Act. However, the Act and this substantive policy statement do not prohibit an establishment that qualifies for the “retail tobacco store” exception to instead choose to sell tobacco products and accessories as well as food or alcohol in an indoor environment that is kept smoke-free at all times. Such establishments may, like any other bar, restaurant, retail store, or other “public place” subject to the Act, utilize the outdoor patio exception to permit patrons to smoke.

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